Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

CHRISTOPHER E. BOUCHAT,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the trial court denied Petitioner's right to confrontation, under the Sixth and Fourteenth Amendments, by preventing defense counsel from cross-examining the complainant, Petitioner's estranged wife, about her prior threats to file false criminal charges against him, and prior false assault and rape charges she filed against him but later recanted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland, Case No. 1513, September Term, 1997, filed June 12, 1998, is unpublished, and appears at Appendix 1 to the petition. On September 15, 1998, the Court of Appeals of Maryland denied a Petition for Writ of Certiorari and the Order appears at Appendix 14.

JURISDICTION

The Order of the Court of Appeals of Maryland was filed on September 15, 1998. This petition is filed within 90 days of that Order, as required by Rule 13. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. VI:

> In all criminal prosecutions, the

> accused shall enjoy the right ... to be confronted with the witnesses against him ....
>
> U.S. Const. amend. XIV:
>
> ... [N]or shall any State deprive any person of life, liberty, or property, without due process of law... .

STATEMENT OF THE CASE

Christopher Bouchat, Petitioner, and his wife, Carmelita Bouchat, were separated. Ms. Bouchat had temporary custody of the couple's daughters. On January 4, 1997, Petitioner arrived at his wife's house to pick up his daughters to take them to a birthday party.

After leaving the house, Petitioner's daughters informed him that Ms. Bouchat was in bed with another man. A short time later, Petitioner returned to Ms. Bouchat's house. He was upset that his young daughters had witnessed their mother in bed with another man. When Petitioner arrived, Ms. Bouchat's roommate, Wendy Riggleman, went upstairs to alert her. Ms. Riggleman entered the bedroom, where Ms. Bouchat was in bed with her paramour, Oziel Diaz. Ms. Riggleman closed the bedroom door behind her, and told Ms. Bouchat to get out of bed.

Petitioner went upstairs, and pushed the bedroom door open, causing Ms. Riggleman to fall into one of the beds. There was no dispute that physical contact occurred between Petitioner and his estranged wife. The dispute revolved around the identity of the aggressor, the nature and extent of the physical contact, and whether or not Petitioner had any legal culpability for his conduct.

Ms. Bouchat testified that Ms. Riggleman came into the bedroom, held the door closed, and told Ms. Bouchat to get up. At that point, the bedroom door was hit from the other side and flew open, pushing Ms. Riggleman into the bed. According to Ms. Bouchat, Petitioner was enraged and upset. He got on top of his estranged wife, grabbed her, and then threw her against a wall and bedpost. Further, Ms. Bouchat testified that Petitioner threw punches at Mr. Oziel, and then followed him out of the house, pushing him along the way.

On the other hand, Ms. Riggleman, Ms. Bouchat's friend and roommate, in large respects contradicted Ms. Bouchat's version of events. Ms. Riggleman testified that Petitioner pushed his wife, causing her to fall onto the bed. Ms. Bouchat then grabbed at Petitioner, who responded by pushing his wife back. According to Ms. Riggleman, Petitioner never threw his wife around; never attempted or succeeded in striking any blows; and never had any contact with Mr. Oziel at all.

Petitioner never denied having physical contact with his wife. Rather, Petitioner testified that Ms. Bouchat initiated the physical contact by shoving him. Petitioner responded by pushing his wife away. His wife then jumped on his back. According to Petitioner, any force he used was strictly in self-defense.

The State never called Mr. Oziel, the paramour, to testify.

The incident was brief. There were no serious injuries. After the incident ended, Petitioner left his wife's house and went to a convenience store to call the police. Meanwhile, Ms. Bouchat also called the police. Petitioner then returned to the house. The police arrived, interviewed the parties, observed marks on Ms. Bouchat, and arrested

Petitioner. A search of his truck revealed some wood and a camping axe. He was charged with fourth degree burglary, three counts of second degree assault, and two counts of carrying or transporting a concealed deadly weapon.

At the time of the incident, contested divorce and custody proceedings were pending between Petitioner and his estranged wife. In view of the conflicting descriptions regarding the manner in which the incident occurred, the primary issue at trial was credibility. Petitioner sought to attack his wife's credibility through cross-examination and introduction of extrinsic evidence regarding her bias and ulterior motive as follows: (1) his wife had threatened to file false criminal charges against Petitioner and his family to "ruin them"; (2) she had told a police officer that she was "building a paper trail" for the parties' divorce and custody case; and (3) following the statements, Petitioner's wife did in fact file various police reports and criminal charges against Petitioner and his family, including assault and rape charges, which were either resolved in their favor or later recanted by his wife.

Petitioner's trial counsel made a proffer to the trial court before his wife testified requesting permission to conduct cross-examination and introduce extrinsic evidence regarding bias and ulterior motive. (Apx. 4). During cross-examination of Petitioner's wife, his trial counsel again requested permission to cross-examine her regarding her bias and ulterior motive. The "trial court ruled that the specific acts proffered by [Petitioner] for which Ms. Bouchet [sic] was never charged were not relevant to the case." (Apx. 6). The trial judge prohibited any cross-examination whatsoever regarding the issues. Petitioner was convicted of second-degree assault; the jury acquitted him of all remaining charges. He was sentenced to six months' imprisonment, with all but two months suspended.

Petitioner appealed his convictions to the Court of Special Appeals of Maryland. He maintained that "he was denied the right to cross-examine effectively the State's chief witness and ultimately denied the right to a fair trial." (Apx. 6). The appellate court concluded that the denial of cross-examination by the trial court constituted "an evidentiary ruling," which could be disturbed only for an abuse of discretion. Without any analysis or explanation, the appellate court concluded that there was no abuse of discretion. (Apx. 8).

REASONS FOR GRANTING THE PETITION

THE TRIAL COURT DENIED PETITIONER'S RIGHT TO CONFRONTATION, UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, BY PREVENTING DEFENSE COUNSEL FROM CROSS-EXAMINING THE COMPLAINANT, PETITIONER'S ESTRANGED WIFE, ABOUT HER PRIOR THREATS TO FILE FALSE CRIMINAL CHARGES AGAINST HIM, AND PRIOR FALSE ASSAULT AND RAPE CHARGES SHE FILED AGAINST HIM BUT LATER RECANTED.

The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." This right is incorporated in the Fourteenth Amendment and applies in State criminal proceedings. Pointer v. Texas, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965). A primary interest secured by the Confrontation Clause is the right of cross-

examination. Douglas v. Alabama, 380 U.S. 415, 418, 13 L. Ed. 2d 934, 85 S. Ct. 1074 (1965).

The "opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process," Kentucky v. Stincer, 482 U.S. 730, 736, 96 L. Ed. 2d 631, 107 S. Ct. 2658 (1987), and "is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974). Indeed, this Court has recognized that cross-examination is the "'greatest legal engine ever invented for the discovery of truth.'" California v. Green, 399 U.S. 149, 158, 29 L. Ed. 2d 489, 90 S. Ct. 1930 (1970) [quoting 5 J. Wigmore, Evidence § 1367, p. 29 (3d ed. 1940)].

A focused "attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." Davis, supra, at 316. The "exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Id. This Court has held it to be error where a trial court impermissibly restricted cross-examination of prosecution witnesses regarding evidence of possible bias or motive. Olden v. Kentucky, 488 U.S. 227, 102 L. Ed. 2d 513, 109 S. Ct. 480 (1988) (motive to lie); Delaware v. Van Arsdall, 475 U.S. 673, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986) (motive to favor prosecution); Davis v. Alaska, supra (bias and prejudice).

In the present case, defense counsel provided a detailed proffer to the trial court outside the presence of the jury. Specifically, a divorce was pending between Petitioner and his estranged wife. His wife had threatened to file false criminal charges against Petitioner and his family to "ruin

them." In addition, she had told a police officer that she was "building a paper trail" for the divorce case. After these threats, Ms. Bouchat did in fact file various police reports and criminal charges, including rape, assault, child abuse, trespass, and destruction of property. She recanted the rape claim several days later in statements to an investigating police officer. After providing this reasonable factual basis for the proposed inquiry, defense counsel maintained that this evidence was probative of Ms. Bouchat's credibility. The trial judge, however, refused to permit any inquiry.

Ms. Bouchat in the present case had falsely accused Petitioner of an assault and rape. The proffered cross-examination went to the heart of the complainant's credibility. The trial court denied Petitioner's right of confrontation by restricting cross-examination of Ms. Bouchat, inhibiting his ability to obtain a fair trial. Judge Andrew Sonner, in his concurring opinion, agreed:

> During the trial, appellant proffered evidence that his estranged wife had previously threatened to file criminal charges against him and ruin his family and, further, that she had told a police officer that she was trying to create a paper trail to use in her civil divorce proceedings against him. Appellant also proffered that his estranged wife had made false charges against him and his family ranging from rape to trespassing and destruction of property. At the time that his estranged wife testified, appellant sought to cross-examine her about the specific threats and the trial court refused to permit him to do so. I would find that to be error.

(Apx. 11).

The outcome of this case rested on credibility. Four people were present in the bedroom at the time of the incident. One (the wife's paramour) never testified. The wife's roommate contradicted most of the wife's testimony. There was no dispute that physical contact occurred between Petitioner and his estranged wife. The only dispute was the identity of the initial aggressor, and the nature and extent of physical contact. Petitioner was deprived of his right of cross-examination and a fair trial when the trial court prevented him from cross-examining his estranged wife regarding her prior threats to file false criminal charges, and the fact that she previously had recanted other serious assault (rape) charges she had lodged against him.

An important part of the right of confrontation and cross-examination is the right to cross-examine regarding a witness' bias or motive. Delaware v. Van Arsdall, supra; Davis v. Alaska, supra. A witness may be impeached by proof of bias, prejudice, interest in the outcome of the proceeding, or a motive to testify falsely. In the present case, defense counsel sought to cross-examine Petitioner's estranged wife regarding previous threats she had made to file false criminal charges against Petitioner and his family to "ruin them," as well as statements to a police officer that she was "building a paper trail" for the divorce case. In addition, defense counsel sought to elicit on cross-examination that, pursuant to these threats, Ms. Bouchat did in fact file various criminal charges against Petitioner and his family. These charges either were resolved in favor of Petitioner or his family, or they were recanted. In particular, Petitioner had been accused of raping his estranged wife, only to have her recant those charges several days later.

Ms. Bouchat's prior threats to file false criminal charges against Petitioner and his family to "ruin them" was relevant to show her bias and prejudice. In addition, this evidence and statements to a police officer that she was

"building a paper trail" for the divorce case were relevant to show her motive to testify falsely against Petitioner. The trial court not only excluded extrinsic evidence to prove these facts, but it prevented defense counsel from even cross-examining Ms. Bouchat about any of these matters. Both cross-examination and introduction of extrinsic evidence should have been permitted. In failing to do so, the trial court denied Petitioner his right to confront and cross-examine the witness against him.

Judge Sonner agreed and concluded that the trial court erred in preventing cross-examination and introduction of extrinsic evidence:

> I have no quarrel with the majority finding that the court has discretion to restrict extrinsic evidence on collateral matters, Md. Rule 5-616 (b) (2), and even that the court has the discretion to bar cumulative evidence, but that discretion cannot be exercised to exclude such relevant non-cumulative evidence as this appellant proffered for cross-examination from which the jury could infer bias. Evidence of bias based upon threats to charge appellant with a crime in order to gain an advantage in a domestic dispute is probative. . . . It would have been proper, had the witness denied that she had made the threats, for appellant to call those witnesses who would have contradicted her, as the appellant was prepared to do.

(Apx. 11).

Since the primary issue at trial was Ms. Bouchat's credibility, defense counsel's proffered cross-examination and extrinsic evidence went to the "very heart" of Ms. Bouchat's

bias, prejudice, interest in the outcome, and motive to testify falsely. The trial court's refusal to permit cross-examination and introduction of extrinsic evidence deprived Petitioner of his right of confrontation and cross-examination, and his right to a fair trial.

Although Judge Sonner concluded that the trial court erred by restricting cross-examination and prohibiting introduction of extrinsic evidence, he believed that exclusion of the evidence was harmless error, an issue neither raised by the State, nor briefed by the parties. Petitioner recognizes that "the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman harmless-error analysis." Delaware v. Van Arsdall, 475 U.S. at 684. This court stated:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. Petitioner maintains that the trial court's error is not harmless beyond a reasonable doubt.

There were four people present at the time of the incident. Ms. Bouchat testified that Petitioner got on top of her, grabbed her, and then threw her against a wall and bedpost. In addition, she claimed that Petitioner then threw punches at her paramour. The wife's friend and roommate, Ms. Riggleman, supported Ms. Bouchat's testimony that Petitioner initiated the physical contact. However, Ms. Riggleman contradicted most of Ms. Bouchat's version of events. Ms. Riggleman testified that Petitioner pushed his wife, causing her to fall onto the bed. At that point, according to Ms. Riggleman, Ms. Bouchat grabbed Petitioner, who pushed his wife away. Ms. Riggleman testified that Petitioner never threw his wife around, nor did he attempt to strike or succeed in striking his wife. Finally, Ms. Riggleman corroborated the Petitioner's testimony that there was no physical contact with his estranged wife's paramour. Petitioner never denied having physical contact with his wife; rather, he testified that his wife initiated the physical contact by shoving him, and he then pushed her away. Thereafter, his wife jumped on his back. Any force used was strictly in self-defense. The wife's paramour never testified.

The jury may have reached a different conclusion had they been presented with evidence of Ms. Bouchat's bias, prejudice, interest in the outcome, and motive to testify falsely. Evidence that Ms. Bouchat had threatened to ruin Petitioner and his family, and to create a "paper trail" for the divorce case, went to the very heart of her credibility. The fact that she thereafter filed false criminal charges against Petitioner and his family, including a rape charge later recanted, constituted substantial evidence of bias, prejudice, interest in the outcome, and motive to testify falsely. The jury may well have concluded that Ms. Bouchat took advantage of the opportunity to claim that Petitioner was the initial aggressor, and therefore guilty of a crime. In addition, if Ms. Bouchat were successful, as she has been, Petitioner's alleged

conduct and conviction would deflect focus from Ms. Bouchat's own conduct involving the parties' young daughters witnessing their mother in bed with another man. This would inure to her benefit in the pending divorce and custody dispute.

The prosecution's case was far from overwhelming. In fact, the jury acquitted Petitioner of all other charges. If cross-examination of Ms. Bouchat regarding her bias, prejudice, and motive to testify falsely were to have been permitted, the jury may have acquitted Petitioner of assault as well. Accordingly, the trial court's error was not harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: December 14, 1998

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APPENDIX

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UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1513

September Term, 1997

CHRISTOPHER ERIC BOUCHET

v.

STATE OF MARYLAND

Moylan,
Sonner,
Byrnes,

JJ.

OPINION BY MOYLAN, J.
Concurring Opinion by Sonner, J.

Filed: June 12, 1998

Appendix A

The appellant, Christopher E. Bouchet, was convicted by a Howard County jury, Judge Raymond E. Kane presiding, of two counts of second-degree assault. On appeal, the appellant raises seven issues which we have consolidated and restated as follows:

1. Did the circuit court err or abuse its discretion in refusing to admit for impeachment purposes specific evidence regarding the victim's a) prior perjury; b) prior acts of embezzlement; c) false statements or false charges against the appellant and members of his family and against the victim's former husband and members of his family; d) prior false statements to her probation officer; e) prior forgery; and f) character, including her use of prior false social security numbers, immoral conduct, and statements that she intended to ruin her husband?

2. Did the circuit court err in refusing to give a missing witness instruction?

On January 4, 1997, Howard County police officers were called to the home of Carmelita Bouchet to investigate a possible assault. Both Ms. Bouchet and the appellant, her estranged husband, were present when the officers arrived. After observing red marks on Ms. Bouchet's neck and ankle, and speaking with all of the individuals present during the incident, the appellant was arrested. The appellant was subsequently charged with fourth-degree burglary, three counts of second-degree assault, and two counts of carrying or transporting a concealed dangerous weapon.

At trial, Wendy Riggleman, who lived with Ms. Bouchet at the time of the incident, testified that on January 4, 1997, the appellant arrived at the house at approximately 8:00 a.m. to pick up his daughters for the day. She testified that when the appellant and his daughters returned to the house approximately 25 minutes later, she went upstairs to alert Ms. Bouchet and her male companion, Oziel Diaz. In an attempt to hold the bedroom door closed, Ms. Riggleman was thrown onto one of the beds when the appellant pushed open the door. She further testified that upon seeing Ms. Bouchet and Mr. Diaz in bed together, the appellant became upset, pushed Ms. Bouchet, and attempted to reach Mr. Diaz. As a result, the appellant and Ms. Bouchet struggled until David Houck[1] came upstairs and intervened. The appellant then left the house and Ms. Bouchet called 911. According to Ms. Riggleman, Ms. Bouchet had a cut on her ankle, red marks on her ribs and chest and a bruise on her upper thigh.

Ms. Bouchet testified that on January 4, 1997 the appellant arrived, unexpectedly, to pick up their children for a weekend visit. Ms. Bouchet testified that shortly after they left, Ms. Riggleman came into her bedroom, held the door closed, and told her to get up. According to Ms. Bouchet, the door was hit from the other side and flew open, pushing Ms. Riggleman onto one of the beds. She further testified that the appellant, enraged and upset, grabbed her, threw her around, and then went after Mr. Diaz.

In his defense, the appellant testified that he arrived at the house on the morning of January 4, 1997 to take his daughters to a birthday party, and that shortly after they left his "daughters told him that a man had stayed overnight in the bed with their mother." The appellant admitted that he

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[1] For consistency, we will refer to this individual as Mr. Houck even though the State referred to him as David Hogg. His name was apparently spelled three different ways in the transcript "Houck," "Hogg," and "Hope."

returned to the house, went upstairs and opened the bedroom door, which caused Ms. Riggleman to fall backwards. The appellant then testified that he confronted Ms. Bouchet and that there was some pushing and shoving between the two, but that as he recalled it, Ms. Bouchet grabbed him first. He further testified that he did not attempt to strike Mr. Diaz or Ms. Riggleman, and that after Mr. Houck intervened, he left the house, went to a local convenience store and called the police.

The appellant first contends that the trial court erred in refusing to admit for impeachment purposes specific evidence regarding Ms. Bouchet's "long history of theft, deception, threats, false charges, and similar conduct." The list of detailed evidence that the appellant proffered to the trial court below and now contends on appeal that he was entitled to introduce spans seven pages and includes, in great detail, allegations that Ms. Bouchet: embezzled funds, but was never charged; stole office supplies, filed false criminal charges against the appellant claiming she had been beaten, or raped; filed false criminal charges against members of the appellant's family; made false reports to various police officers; forged her husband's name on certain health insurance papers; gave a false social security number to her probation agent and potential employers; frequently abused alcohol and marijuana; and had an affair with an athletic club trainer while married.

Prior to jury selection, the appellant proffered to the trial court that he wished to cross-examine Ms. Bouchet and introduce evidence regarding her character and reputation for untruthfulness. As a result of this proffer, the trial court permitted the appellant to question Ms. Bouchet regarding her two prior theft convictions, and elicit the following testimony from various witnesses as to their opinion of the victim's character or reputation for truthfulness:

1. Kathy Martuzzi, a former employer of

Ms. Bouchet, called Ms. Bouchet an "absolute liar," and stated that in her opinion, Ms. Bouchet was not truthful.

2. Officer Donald Guevarra, a Howard County police officer, who had been to the Bouchet residence four to six times due to her 911 calls about domestic disturbances, stated that she "tends to exaggerate."

3. Brett Schoolnick, a former employer of Ms. Bouchet, stated that she was not honest or trustworthy.

4. Lee Draper, a former employer of Ms. Bouchet, stated that Ms. Bouchet is dishonest.

5. Russell Cook, a Howard County probation officer, stated that Ms. Bouchet was not truthful or honest.

6. Officer Ken Argaugh, a Howard County police officer, testified that Ms. Bouchet had not been truthful in her previous statements to him.

7. Keith Roscoe, a brief tenant of Ms. Bouchet, stated that she was not truthful or honest.

8. Mark Ensey, Ms. Bouchet's former husband, testified that Ms. Bouchet is dishonest.

9. Lawrence Bouchet, Jr., the appellant's

older brother, testified that he would not believe Ms. Bouchet under oath.

10. Lawrence Bouchet, Sr., the appellant's father, testified that he would not believe Ms. Bouchet under oath.

The trial court did not, however, permit the appellant to elicit testimony regarding specific acts of misconduct and instructed counsel for the appellant to approach the bench for a ruling if he believed, based on the testimony that was given, that a specific act was relevant to credibility. Thus, on numerous occasions throughout the trial, counsel for the appellant approached the bench in an attempt to admit testimony regarding alleged specific acts of misconduct. The trial court refused to permit the testimony, finding that such evidence was collateral, irrelevant, and cumulative.

While the appellant acknowledges that he was permitted to introduce generalized evidence regarding Ms. Bouchet's character, he contends that such evidence did not "provide the jury with an accurate depiction of Ms. Bouchet's despicable pattern of lying, cheating, stealing, and other reprehensible immoral conduct." Moreover, the appellant argues that under Md. Rules 5-608 and 5-616, he was entitled to cross-examine Ms. Bouchet and question defense witnesses with respect to the alleged specific acts of misconduct. As a result of the trial court's failure to admit such evidence, the appellant contends that he was denied the right to cross-examine effectively the State's chief witness and ultimately denied the right to a fair trial. We are not persuaded.

Maryland Rule 5-608 (a) permits a character witness to testify that a witness has a reputation for untruthfulness, or that, in the character witness's opinion, the witness is an untruthful person. The rule specifically provides, however, that on direct examination a character witness may not testify

as to specific instances of truthfulness or untruthfulness by the witness. Md. Rule 5-608 (a) (3). While the rule does permit a character witness to be cross-examined about specific instances in which a witness has been truthful or untruthful or about prior convictions of the witness, the rule further provides that:

> upon objection, the court may permit the inquiry only if (A) the questioner, outside the hearing of the jury, establishes a factual basis for asserting that the prior instances occurred or that the convictions exist, and (B) the prior instances or convictions are relevant to the witness's reputation or to the character witness's opinion, as appropriate.

Md. Rule 5-608 (a) (4) (Emphasis supplied.) A trial court's determination as to the admissibility of evidence is within the wide discretion of the court and its ultimate ruling may not be disturbed on appeal unless there has been an abuse of that discretion. We find no such error in the trial court's refusal to admit the proffered evidence under Md. Rule 5-608 (a).

The appellant's contention that he was entitled to cross-examine Ms. Bouchet regarding her own prior conduct not resulting in convictions under Md. Rule 5-608(b) is equally without merit. Rule 5-608 (b) provides that "a court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness." (Emphasis supplied.) The trial court ruled that the specific acts proffered by the appellant for which Ms. Bouchet was never charged were not relevant to this case, and we find no error in that determination.

Additionally, we are not persuaded by the appellant's argument that he was entitled to introduce the proffered

evidence under Md. Rule 5-616. Rule 5-616 provides instances when a witness may be impeached by (1) direct inquiry, and (2) extrinsic evidence. The appellant contends that both types of evidence should have been permitted in the instant case. Specifically, the appellant contends that he was entitled to question Ms. Bouchet regarding the alleged specific acts of misconduct because Rule 5-616 provides (1) that the credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at "proving that the witness is biased, prejudiced, interested in the outcome of the proceeding, or has motive to testify falsely," Md. Rule 5-616 (a) (4) (Emphasis supplied); (2) that in the court's discretion extrinsic evidence may be admitted on collateral matters, Md. Rule 5-616 (b) (2) (Emphasis supplied); and (3) that extrinsic evidence of bias, prejudice, interest, or other motive to testify falsely may be admitted whether or not the witness has been examined about the impeaching fact and has failed to admit it. Md. Rule 5-616 (b) (3) (Emphasis supplied). Again, the appellant fails to realize that as an evidentiary ruling, we may only disturb the trial court's determination not to admit the evidence at issue when we find an abuse of discretion. We find no such abuse.

The appellant's second contention is that the trial court erred in not giving a missing witness instruction with regard to the State's failure to call Mr. Diaz to testify. The appellant contends that Mr. Diaz should have been presented by the State at trial as the only other person in the room when the altercation occurred. Thus, the appellant contends that because of the State's failure to call Mr. Diaz as a witness the jury should have been permitted to infer that Mr. Diaz would have testified in a manner adverse to the State's version of the incident. We are not persuaded.

The appellant was charged with assaulting individuals: Ms. Bouchet, Ms. Riggleman, and Ms. Diaz. Contrary to the appellant's belief, the fact that only Ms. Bouchet and Ms.

Riggleman were called to testify on behalf of the State does not entitle him to a missing witness instruction.

The missing witness rule applies when "(1) there is a witness, (2) who is peculiarly available to one side and not the other, and (3) whose testimony is important and non-cumulative and will elucidate the transaction, and (4) who is not called to testify." Woodland v. State, 62 Md. App. 503, 510 (1985). Thus, a missing witness instruction should not be given if the missing witness was equally available to both sides. Smith v. State, 66 Md. App. 603, 619-20 (1986). As the State points out, there is nothing in the record to show that the appellant attempted to call Mr. Diaz as a witness, nor does he make that argument on appeal. As a result, the appellant has failed to show that Mr. Diaz was a witness "peculiarly available" to the State. Accordingly, we find that the trial court did not abuse its discretion when it refused to give the requested missing witness instruction.

JUDGMENTS AFFIRMED; COSTS TO BE PAID BY APPELLANT.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1513

September Term, 1997

CHRISTOPHER ERIC BOUCHET

v.

STATE OF MARYLAND

Moylan,
Sonner,
Byrnes,

JJ.

Concurring Opinion by Sonner, J.

Filed: June 12, 1998

I concur, but believe it necessary to write separately. I would hold that it was error for the trial court to have restricted appellant's attempt to show bias during his cross-examination of one of the witnesses, his estranged wife, but I would find that the error was harmless beyond a reasonable doubt. I believe that the majority opinion confounds the difference between the rules that govern character and reputation evidence and those that govern the introduction of evidence to show bias.

During the trial, appellant proffered evidence that his estranged wife had previously threatened to file criminal charges against him and ruin his family and, further, that she had told a police officer that she was trying to create a paper trail to use in her civil divorce proceedings against him. Appellant also proffered that his estranged wife had made false charges against him and his family ranging from rape to trespassing and destruction of property. At the time that his estranged wife testified, appellant sought to cross-examine her about these specific threats and the trial court refused to permit him to do so. I would find that to be error.

I have no quarrel with the majority finding that the court has discretion to restrict extrinsic evidence on collateral matters, Md. Rule 5-616 (b) (2), and even that the court has the discretion to bar cumulative evidence, but that discretion cannot be exercised to exclude such relevant non-cumulative evidence as this appellant proffered for cross-examination from which the jury could infer bias. Evidence of bias based upon threats to charge appellant with a crime in order to gain an advantage in a domestic dispute is probative. A court must give wide latitude in allowing a witness to be questioned about bias. *McNeil v. State*, 112 Md. App. 434, 468, 685 A.2d 839 (1996) (citing *Ebb v. State*, 341 Md. 578, 587, 671 A.2d 974, *cert. denied*, ___ U.S. ___, 117 S.Ct. 102, 136 L.Ed.2d 56 (1996)). In fact, in a criminal case, the "refusal to allow the defense to demonstrate bias on the part of the prosecutor's

principal witness through cross-examination is a denial of Due Process under the Fourteenth Amendment as well as an infringement upon [the defendant's] Sixth Amendment rights." *McNeil*, 112 Md. App. at 468 (quoting *Deinhardt v. State*, 29, Md. App. 391, 397, 348 A.2d 286 (1975), applying *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). Once the proper foundation is established, the defendant in a criminal case may, in the court's discretion, introduce collateral evidence that tends to impeach that witness by calling other witnesses to give testimony. Md. Rule 5-616 (b) (3). It would have been proper, had the witness denied that she had made the threats, for appellant to call those witnesses who would have contradicted her, as the appellant was prepared to do.

The other evidence that the trial court excluded, about which appellant complains, went supposedly to the issue of credibility, not directly to the issue of bias. I agree that not only was it within the court's discretion to refuse to allow the jury to hear it, but also that the court was correct in doing so. The court did permit appellant wide latitude in introducing evidence to challenge the credibility of his estranged wife. He succeeded in getting evidence before the jury that some prior decisions from our courts would have supported excluding. *See Ogburn v. State*, 71 Md. App. 496, 526 A.2d 614 (1987). Simply because the trial judge lowered the net and permitted appellant to introduce that evidence, however, does not justify the refusal to permit the introduction of evidence of bias that appellant was clearly entitled to put before the jury.

Nevertheless, it does appear that in the context of this case, that is, the overwhelming evidence of appellant's guilt, the exclusion of the evidence was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Dorsey v. State*, 276 Md. 638, 659, 350 A.2d 665 (1976) (error is harmless if reviewing court, upon independent review, can declare beyond a

reasonable doubt that error did not in any way influence the verdict). In addition to the witnesses to appellant's assaultive behavior, appellant admitted that after picking up his children, he went back to where his estranged wife was in bed with a man with whom she had spent the night and then engaged in a "some pushing and shoving" with her. It is not at all likely that the evidence of bias that the trial court erroneously excluded would have affected the verdict. I do, therefore, concur in the judgment affirming the conviction.

CHRISTOPHER ERIC BOUCHAT	*	IN THE
	*	COURT OF APPEALS
	*	
v.		OF MARYLAND
	*	
		Petition Docket No.
	*	332
STATE OF MARYLAND	*	September Term, 1998 (No. 1513,
	*	Sept. Term, 1997, Court of Special
	*	Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

Date: SEP 15 1998

Appendix B

Maryland Rule 5-616 (b)(2):

> (b) *Extrinsic impeaching evidence.*
> (2) Other extrinsic evidence contradicting a witness's testimony ordinarily may be admitted only on non-collateral matters. In the court's discretion, however, extrinsic evidence may be admitted on collateral matters.

Appendix C